United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7627

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket 75-7627

COMPANIA PELINEON DE NAVEGACION, S.A.,
Plaintiff-Appellant,

against

TEXAS PETROLEUM COMPANY,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEE'S BRIEF

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APPELLEE'S BRIEF

Statement of the Case and Proceedings Below

This suit was brought by plaintiff/appellant, Compania Pelineon de Navegacion, S.A., as owner of the tanker CAPETAN MATHIOS (hereinafter referred to as "the ship") against defendant/appellee, Texas Petroleum Company (hereinafter referred to as "Texpet") to recover physical damage and loss of use or lost profit. The ship was damaged as the vessel was being maneuvered and navigated by a pilot employed by Texpet into a sea berth operated by Texpet at Tumaco, Colombia. The propeller and propeller shaft of the ship came into contact with a chain of one of the mooring buoys.

The casualty occurred on September 29, 1972. Damage to the ship was repaired in March/April 1973. From January 18, 1970 to November 25, 1973, the ship was under a long term time charter to Gulf Oil Corporation.

The ship and Texpet settled the liability issue in the case under terms of plaintiff receiving 80% of all its provable damage. The ship and Texpet also settled the question of the quantum of provable damage sustained by the ship for hull and engine damage, and Texpet paid the ship $180,090.00 for same under the settlement. Thus, the remaining issue, which was tried below, was how much the ship was entitled to recover for loss of use or lost profit.

The ship claimed that its provable damage for loss of use was in the amount of $97,077.26, i.e. the lost time charter hire not paid by Gulf Oil Corporation for the 2.226 day delay at Tumaco in September/October 1972 at the time of the casualty, and the 22.953 day repair period in March/April 1973. The ship also claimed that its provable damage included additional alleged lost profit in the amount of $303,297.05, representing the difference between the profit the ship made during the last 25.179 days of the *time charter* with Gulf Oil Corporation in November 1973,

and the profit that the ship could have allegedly made by operating under two assumed (but wholly speculative) *voyage* charters that would take 12 to 13 days each, starting at an assumed (but wholly speculative) date, carrying an assumed (but wholly speculative) quantity of cargo, between assumed (but wholly speculative) ports, at assumed (but wholly speculative) base freight rates, under assumed (but wholly speculative) *voyage charter* World Scale* rates—all because Gulf Oil Corporation, in June of 1973, long after the casualty, exercised an option it had in the time charter with the ship, to extend the time charter for the 64 day off-hire time that had accumulated from August of 1971, which included 25.179 days of off-hire time allegedly caused by the casualty at Tumaco.

Trial Briefs were filed on September 24, 1975. Trial was held on September 26 and 29 before the Honorable George J. Boldt, U.S.D.J. Shortly after the trial transcript was ready, post Trial Briefs were submitted on October 8, 1975, together with proposed Findings of Fact and Conclusions of Law. Oral argument was heard by Judge Boldt on October 8, 1975. On October 9, 1975, the Court read its oral decision into the record from the bench, in the presence of counsel, and adopted certain of the proposed Findings of Fact and Conclusions of Law.

The Court held that the ship's provable damage for loss of use or lost profit was in the amount of $81,681.49, measured by the time charter rate in the time charter party (agreement) between the ship and Gulf Oil Corporation, for the 2.226 day delay at Tumaco, and 18.953 days of the 22.953 day repair period of the vessel. The Court denied any recovery for any alleged lost profit during the last 25.179 days of the time charter with Gulf Oil Corporation. The Court awarded the ship interest on the above award, with each side bearing its own costs. After applying the terms of the 80% settlement, this resulted in a judgment of $75,258.05 in favor of the ship.

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* "World Scale" is an index used to describe the level of the charter market. The higher the World Scale, the higher the cost of shipping goods on a vessel.

The District Court held that the 25.179 day repair period in March/April 1973 was to be reduced by 4 days for purposes of awarding loss of use damages, because of the unreasonable and long delay between the casualty and the repair period (6 months); no one knew that the vessel was unseaworthy when she went into the repair yard; it was thought that the Tumaco damage could be repaired in about one week; the repair period was set for a time mutually convenient to the ship and charterer; prior to the casualty the ship had intended to go into the yard in the summer of 1973; the ship had simply moved up slightly the aforesaid yard period and tried to take advantage of same to effect casualty repairs; substantial owner's work of 4 to 7 days was accomplished during the repair period; and because of ". . . the unconvincing evidence purporting to show that both types of repair were made in the time required to make unseaworthy repairs" (243a).

The District Court stated as follows in its Opinion, relative to the claim for lost profit over and above the ship's claim for loss of use or lost profit during the delay at Tumaco and the repair period:

> "Plaintiff's claim for lost profits due to the 25.179 days which were added to the Gulf charter and resulted in a later redelivery date than anticipated, is hereby denied for the following reasons:
>
> Plaintiff in effect seeks to have defendant pay twice for a single wrong. The off-hire provision in the charter party is a contractual provision between plaintiff and the charterer. Plaintiff well knew that any off-hire time could be added to the charter term and that plaintiff would be paid at the agreed rate for any off-hire period added. Plaintiff's attempt to recover hypothetical profits from defendant over and above those amounts actually contracted and paid under the charter party has never before been awarded in similar circumstances and this Court finds and holds it to be inequitable under well accepted equitable principles in Admiralty.
>
> In addition and perhaps more significant, this Court finds plaintiff's proposed calculations for profits lost

as a result of the charter term extension to be highly speculative, and have been based on questionable assumptions of unforeseeable facts, admitted errors and have not been established with reasonable or any certainty by the evidence. Further, market conditions prevailing during the claimed damage period were very extraordinary and uncertain making it difficult, if not impossible, to approximate profits with any degree of certainty. The Court has carefully reviewed each of the items of speculation and uncertainty enumerated at pages 31-32 of defendant's post trial brief. Upon full consideration thereof and the portions of the transcript supporting each item, the Court hereby finds and adopts all items as facts established by the evidence in this case. These are as follows:

[Listing various elements of speculation, remoteness and unforeseeability which will be discussed *infra.*]

I fully subscribe to all of these and, indeed, think they are not exhaustive of other highly unpredictable matters that are an essential part of plaintiff's computation of what it might have made and go far from establishing what it would have made, which is the standard required by the law." (244a, 245a)

Statement of Facts

The long term time charter between the ship and Gulf Oil Corporation for "eighteen months, fourteen (14), days more or less at Charterer's option" was entered into on September 19, 1969 (197a). The vessel started operating under the charter on 18 January 1970 (113a). By an addendum, dated May 28, 1971, the term or period of the time charter was extended for an additional ". . . two years, one month more or less, at Charterers option" (193a).

The terms of the charter were negotiated between the ship and Gulf Oil Corporation. As a result, as indicated on the face of the charter party and addendum thereto, many terms and conditions were added to and deleted from

the printed form (140a, 141a, 193a-204a, 250a, 251a). Paragraph 10 of the agreement provided as follows:

> "The time the vessel is off-hire during the original term of this charter or any extension thereof, pursuant to the provisions of this charter, shall be added to the original term or the extension during which the time off occurs, *if Charterer so elects* and gives Owner written notice of such election at least 30 days prior to expiry of the original term or extension during which the time off occurs, but time off during the original term may not be added to any extension thereof." (198a) (Emphasis added)

Texpet was obviously not a party to the above negotiations or charter, knew nothing of the terms of the agreement, and as far as Texpet knew or anticipated, the ship could have been operating under a bare-boat or demise charter, or voyage charter, at the time of the casualty. If the vessel happened to have been on time charter, it would not have been at all unusual for the charter party not to contain the above quoted off-hire provision (165a, 166a, 260a, Finding of Fact (F.F.) 35).

The casualty at Tumaco occurred on September 29, 1972. From October 3, 1972 to March 29, 1973 the ship operated under the above charter. In March and April of 1973, the ship was repaired and thereafter continued to operate under the time charter (31a, 249a, 250a). On June 28, 1973, Gulf Oil Corporation exercised both options, i.e. to extend the charter "one month more or less", and to extend the charter period by the time of all off-hire from August 24, 1971. The latter date was the time calculated and agreed between the ship and Gulf Oil Corporation to be the time when the eighteen month original charter period, "14 days more or less", had ended (187a, 208a, 212a). Up to June 28, 1973, the ship had no idea whether or how the charterer would exercise its options, which depended in part upon many internal considerations at Gulf Oil Corporation (47a, 48a, 261a).

The exercise of the off-hire option, together with the exercise of the "one month more or less" option, resulted

in a one month extension of the expiration date of the charter period from August 24, 1973 to September 24, 1973, and a claim by the charterer for a further extension of 64 days 17 hours 58 minutes, based upon various alleged periods considered by the charterer to be "off-hire" under the charter which occurred between: (1) the end of the 18 month, 14 day more or less charter period, and the casualty at Tumaco; (2) the casualty at Tumaco and the repair period; and (3) the repair period and the conclusion of the time charter (49a, 50a, 51a, 61a, 220a, 261a). The off-hire claimed was as follows:

Period	*Description*	*Days*	*Hours*	*Minutes*
3/21- 4/26/72	Drydocking—Hoboken	36	20	58
9/29-10/ 1/72	Repairs—Tumaco	2	5	25
2/17- 2/18/73	Hvy. Tank Sediment—Amuay Bay	1	11	15
3/29- 4/19/73	Drydocking—New York	22	22	52
6/9 - 6/10/73	Repairs—Panama Canal	1	5	28

(220a)

There was a dispute about the 1 day 11 hour 15 minute alleged item of off-hire. It was compromised in half by the ship and charterer, resulting in an agreement that the charterer was entitled to an extension under Paragraph 10 of the charter party of 64 days 0 hours 21 minutes (52a, 211a, 231a, 232a, 254a).

According to the ship, 25.179 days of the 64 day 0 hour 21 minute extension was the result of the Tumaco casualty (50a, 211a). By reason of the District Court's four-day reduction of the repair period, only 21.179 days of the 64 day off-hire claim was attributable to the Tumaco casualty (258a, 259a). In any event, the length of the off-hire extension depended upon what off-hire took place both before and after the casualty, and before and after the repair period of the vessel; depended upon the exercise of two options (one of which had nothing to do with the Tumaco casualty); and also depended upon how the ship and/or charterer claimed and/or negotiated out how much off-hire the charterer was entitled to, all of which was relevant to the question of what theoretical date the expiration of the charter would be extended to (47a, 48a, 49a, 50a, 51a, 71a, 261a).

Since the vessel was operating under a time charter (as distinguished from a voyage charter) the terms of the agreement provided for a specific amount of money ($3.85 per ton of the ship's deadweight tonnage or cargo carrying capacity of 30,220 tons) to be paid by the charterer to the ship per month (193a, 197a, 207a). This resulted in a daily rate of about $3,850.00, and a profit of $2,179.36 per day for the ship (78a, 207a, 258a). This time charter rate and profit was the basis upon which the District Court awarded loss of use and lost profit to the ship for the delay at Tumaco and for a portion of the repair period. The ship continued to make the above profit of $2,179.36 per day during the extension period (31a, 258a).

Based upon the foregoing options, off-hire periods, exercise of options, claims and negotiations, the time charter period was extended to 0116 hours on November 27, 1973 (225a).

When a vessel is operating under a time charter, problems often arise as to when the vessel is to cease operating under the time charter. This is because the expiration time and date of the charter period is invariably not exactly the same as the time and date of the completion of a particular voyage, leading to problems or controversies dealing with concepts of "overlap/underlap", and the interpretation and application of the controlling charter party agreement and relevant legal principles (159a, 160a). Such a dispute, in fact, arose between Gulf Oil Corporation and the ship toward the end of the time charter extension in November 1973. The charterer contended that it was entitled to accomplish one more voyage. The ship disagreed. The dispute ended with the ship simply being withdrawn by its owners from the time charter (the vessel being manned by employees of the shipowner) and the ship ceased operating under the time charter at 2020 hours on November 25, 1973 (142a-146a, 225a-230a; Exh. 34, p. 3).

One of the many assumptions that the ship's claim for additional lost profit in the amount of $303,297.05 during the extension period was based upon, was the assumption that if the Tumaco casualty had not occurred, the vessel

would have entered into a voyage charter in early October at World Scale 450, and would have entered into a second voyage charter in late October at World Scale 300 (26a-31a, 100a, 101a, 104a, 105a). There was no evidence of any offers to charter the CAPETAN MATHIOS during the extension period.

As a result of what happened in the tanker charter market in late October and November of 1973, under the ship's theory of recovering alleged lost voyage charter profit during the extension period, the later the expiration date of the time charter "but for" the Tumaco casualty, the lesser the claim of the ship for lost profits during the extension period. This led to the strained attempt by the ship to convince the District Court (repeated on appeal) that the vessel would have been returned to the vessel owner on October 25, 1973, "but for" the Tumaco casualty, and the first of two hypothetical voyage charters would have been entered into in early or mid-October, 1973. Mr. Hatgis admitted that if the vessel owner had not gotten back its vessel on October 25 or October 27, and the first voyage of his hypothetical two voyage charters was not contracted for in early or mid-October, 1973, his calculations for loss of profit during the extension were unrealistic and incorrect (73a, 152a).

The ship's position that the vessel would have been returned on October 25, 1973 (Appellant's Brief, p. 6), or would have been contracted for in early or mid-October if the Tumaco casualty had not occurred, is complete speculation, was not found by the District Court, is contrary to the facts in the case, and is inconsistent with the District Court's finding that just when the vessel would have been returned "but for" the Tumaco casualty, was "most speculative" (261a).

If one wanted to speculate as to when the expiration time and date of the time charter would have been extended to, leaving out or "but for" the off-hire related to the Tumaco casualty, one could try to assume that the ship did not sustain the casualty at Tumaco; did not have the delay at Tumaco; and did not have the Tumaco related repairs she

did have in March/April 1973; and assume further that all other off-hire, operations and experience of the ship would have remained the same as it actually was.* One could then deduct 25.179 days (25 days 4 hours 17 minutes) from the above 0116 hours, November 27, 1973 expiration date (or more properly deduct 21.179 days, in accordance with the District Court's finding that four days of the alleged off-hire period for repairs were not attributable to the Tumaco casualty for loss of use purposes); or one could add 38 days 20 hours 4 minutes (i.e. 64 days 0 hours 21 minutes total off-hire, minus the alleged 25 days 4 hours 17 minutes off-hire due to the Tumaco casualty) to the September 24, 1973 (0055 hours) date, which was the end of the "one month more" option extension; or one could more properly add 42 days 20 hours 4 minutes (again consistent with the Court's four-day reduction of off-hire time attributable to Tumaco casualty) to the September 24 (0055 hours) expiration date (61a). This would result in the time charterer being theoretically entitled to the use of the vessel until 2059 hours on November 1, 1973, or November 5, at 2059 hours. However, the above problems of "overlap/underlap" would then have to be considered if one intended to further speculate as to when the vessel might have been actually returned to the vessel owner.

Under any view, the charterer should have been permitted to take another voyage after October 25, 1973, with a November 1 or November 5 expiration date.** At one

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* A logically impossible assumption to make, given the different service, use and voyages the vessel would have had between March 1973 and the end of the time charter, if the Tumaco casualty, delay, and Tumaco repairs had not taken place.

** From October 25, at 2345 hours (the date when the ship actually completed a voyage at San Juan), to November 1, or November 5, at 2059 hours, is a period of 6 days 21 hours 16 minutes, or 10 days 21 hours 16 minutes, respectively. This would have been more than half the time needed for another voyage, which should have permitted an "overlap" to complete another voyage (154a, 155a, 156a, 159a, 160a), even assuming a 13 day 12 hour extra voyage assumed by Mr. Hatgis in calculating the possibility of overlap allowing another voyage (208a). Note his strained attempt to

(footnote continued on following page)

point in the trial, assuming a completed voyage on October 25, 1973, and a November 3, 1973 expiration date, Mr. Hatgis admitted that another voyage would have been permitted, and was obviously of the view that "overlap/underlap" would apply, since he stated the vessel would be returned about November 8, although he later changed his testimony (63a-67a; 155a-157a).

There is no doubt that if there were 6 days or more left before the vessel had to be returned to her owners by the time charterer, and the owner "pulled" the vessel back without permitting an additional voyage (Tr. pp. 210, 211, 260), there would have been a claim asserted by Gulf Oil Corporation against the owner, and that claim would have been settled by negotiation, or would have been determined by an arbitrator or a Court, which, of course, would add still another factor of uncertainty and speculation to the ship's claim for alleged lost profit in the extension period (Tr. p. 260).

Mr. Hatgis also admitted that whatever the date for the expiration of the extension of the time charter (November 1, or November 5), the charterer would have arranged for that type of voyage, just prior to the return of the ship, that would have put the vessel in a position to be returned as close to the expiration date as possible—witness the fact that ultimately the vessel was due back after all extensions at 0116 hours on November 27, 1973,

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(footnote continued from preceding page)

get the time between October 25 and the expiration date to be less than one-half the time needed for the extra voyage by equating the "one month more" provision in the charter to be "30 days", rather than going from August 24, 1973 to September 24, 1973 (61a, 208a). The ship realized that a one day difference could mean the difference between the charterer being allowed one more voyage under the principles of "overlap/underlap", which in this case would mean a later return to the vessel owner, "but for" Tumaco, of about two weeks, which in turn could mean a difference of a couple hundred thousand dollars in the ship's calculations for lost profit during the extension period. Actually, a determination of whether the charterer would be entitled to take an additional voyage, at the time an additional voyage would be requested, would have been made on the basis of an assumed 12 day voyage (Tr. p. 264).

and the vessel was actually withdrawn, after the completion of a voyage, at 2020 hours on November 25 (161a-163a, Exh. 34). At the same time, Mr. Hatgis testified that normally a vessel was fixed several days before her availability (68a, 69a). Given an availability of November 1 or 5, or an even later date, the assumed theoretical fixing of the first of the two hypothetical voyages in early or mid-October falls, as does all the ship's calculations, for lost profit (Tr. p. 215, 72a, 73a).

Nevertheless, if one wished to continue or speculate further under the ship's theory of alleged lost profit during the extension period, one could assume a voyage charter being entered into for the first of the two hypothetical voyages, several days before November 1, or November 5, or some days later, and try to look at what the ship might have done, based upon what the market was doing, during the relevant period.

Thus, under the ship's theory, another (but by no means the last) factor or force, in addition to the charter party options, exercise of options, off-hires, off-hire claims and negotiations, overlap/underlap, time between the casualty and the extension period, period of repair, etc., comes into play between the casualty and the extension period to effect the alleged lost profit—namely—the tanker charter market conditions. As to this, the District Court stated:

> ". . . market conditions prevailing during the claimed damage period were very extraordinary and uncertain . . ." (245a)

and adopted the following findings:

> ". . . The sharp drop in tanker rates started in approximately the last third of October and continued thereafter.
>
> * * *
>
> There were great fluctuations, and much instability in the voyage world scale rate from day to day, or even within the same day, around the time when the owners might have gotten the vessel back, but for the Tumaco casualty." (255a, 261a)

The record fully supports the Court's findings. Indeed, the ship does not even question them. Thus, under the ship's theory, added to the speculation of when the ship would have been returned "but for Tumaco", is the further speculation as to what World Scale rates would have been obtained for the fictitious two voyages.

From the time the ship was repaired in April 1973, until mid-October 1973 (which was of course long after the casualty of September 1972), there was an unprecedented rise in the tanker voyage charter market (20a, 261a). This rise reflected the worldwide increase in the use of energy and oil, and the relative scarcity of vessels to carry oil (128a). In late September and early October 1973, the charter rate for tankers was at an all time high. However, after the outbreak of the Arab-Israeli war on October 6, 1973, which was shortly followed by an oil embargo and/or reduction in oil production by various crude oil producing nations, the charter market became extremely unstable and took a very severe drop due to the abundance of ships and the scarcity of oil cargoes, again following the law of supply and demand. By late October, the high rate of late September and early or mid-October had dropped severely, and the rate continued to drop sharply from November 1 on (20a, 28a, 71a, 128a, 129a, 255a).

Mr. Hatgis testified, as to the time when the market was rising, as follows:

> "Well, there was an *unprecedented* boom in the tanker market at the time, and every day we would hear business conducted at high rates. There was never a period like that in recent years where the market was as healthy and vigorous as the ones we experienced at that time." (20a) (Emphasis added)

Appellant attempts to imply that a 450 to 500 World Scale rate that was obtained by some vessels up to mid-October, and a World Scale rate of 300 to 350 obtained by some vessels in the later part of October, were the rates that the District Court found would have been applicable to the theoretical first and second voyages for which the ship claims additional lost profit. The District Court did

not so find in Finding 22(a) (256a), which finding goes to the unprecedented, remote and unforeseeable rise in the market, and its rapid decline, rather than any market rate or range of World Scale rates that could be applied to the voyages theorized by the ship. What the District Court did find was:

> "The sharp drop in tanker rates started in approximately the last third of October and continued thereafter." (255a)

Without question, the market conditions in the later part of October to late November 1973 were changing radically and quickly, and were very unstable. There was an extraordinarily wide spread of rates applicable for fixtures even within one day, let alone from day to day. On October 26, World Scale was in the neighborhood of 250 to 300 (whereas the ship assumed a World Scale of 450 for the first of its two assumed voyages). By October 29, 30 and 31, there were spreads of World Scale rates applicable to charters fixed *in the same day* of 155 points, 180 points, and 235 points, respectively, for similar sized vessels in the Caribbean trade, bearing in mind that a difference of 100 points would mean a difference in profit for *one* voyage of about $60,000.00, even using all the discredited assumptions of Mr. Hatgis' calculations. By mid-November, World Scale was down to the 200 to 300 range (129a-132a, 235a, 236a) (Sheets for October 26, 29, 30, 31, and mid-November, in Exh. 14).*

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* A word must be said about the allegedly representative or relevant charters listed on Page 14 of Appellant's Brief, especially going to how well they indicate the time of the radical drop in rates and the spread of daily rates at the critical time, i.e. from late October on.

a) THE STEPHANIE CONWAY was *contracted* for on October 18, 1973 (Exh. X). She was *delivered* on October 23 or 24. Presumably, the dates indicated by Appellant on Page 14 were intended to be dates of *contract*, not delivery.

b) The TBN for 10/25/73 was to the West Coast of the U.S., not the Atlantic Coast (Exh. X).

c) For 10/26/73, the VIRGO, a 17,000 ton deadweight capacity vessel, is listed at 300 World Scale, as being allegedly com-

(footnote continued on following page)

Thus, the market conditions were just as volatile going down as they had been going up. Mr. Hatgis testified:

> "In this tanker market, we could trade a vessel with XYZ Company, and all of a sudden Y Company might come in and we can get fifty points more from the Y Company. So you cannot say what is the range of market conditions at that particular moment when you fix. So the market may be 400 at three o'clock in the afternoon and 3:30 you might fix at 450 or 500. It is psychological, and many factors are taken into consideration when you trade a ship." (105a, 106a)

It is not true, as the District Court fully understood and indicated, that by merely estimating what wide range of World Scale was generally applicable to certain voyage charters during a given week or two in late October or November 1973, one could even remotely estimate what sort of profit, *if any*, this vessel owner lost during said period. As much as the ship would like to have everyone disregard them, there are many other critical factors to consider.

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parable to the CAPETAN MATHIOS, which was 30,000 tons deadweight capacity; whereas, for some reason, the PENN CHALLENGER, from the Caribbean to the U.S. Atlantic Coast/Gulf, at 32,000-35,000 DWT, at a World Scale of 250, is not listed (Exh. 13).

d) For 10/29/73, the STEPHANIE CONWAY, at 28,000 DWT, at a World Scale of 430, is included but the TBN from the Caribbean to the U.S. Atlantic Coast—a "handy" size vessel—at World Scale 275, is left out (Exh. X). (Note the spread *in one day* between 275 and 430).

e) On 10/30/73 a spread of 180 points in the one day is indicated by the two ships selected by Appellant.

f) For 10/31/73 Appellant includes two ships at World Scale 275, but leaves out one miraculously fixed at 500, for a spread of 225 points in one day.

g) The listing conveniently does not continue into November to a time relevant to the second of the theoretical voyages.

h) The list, and the facts, and the findings of the District Court do not substantiate a 450 rate, or a 350 rate, or anything like it, for the "last half" of October, as alleged by the ship (Appellant's Brief, p. 15).

At the time when a voyage charter is entered into, a World Scale is agreed upon between the shipowner and charterer for a voyage to take place within certain broad geographical areas. When specific ports are later designated by the charterer, a specific base freight rate (which differs substantially between various ports) is applied to the World Scale rate agreed upon, to arrive at a freight rate per ton of cargo to be carried on the voyage, e.g., at a World Scale rate of 200, with a base freight rate of $1.20 applicable between two specific ports, the vessel owner is entitled to gross freight of 2.0 x $1.20, or $2.40 per ton carried. After obtaining the price per ton, you then have to know how much tonnage of cargo will be carried on the voyage, together with what bunker (fuel) costs will be for the voyage (which expense is for the account of the vessel owner in a voyage charter, as compared to a time charter where the charterer pays for bunkers) together with what the various port charges will be, in order to arrive at a net profit figure for the voyage (74a-78a, 83a-87a, 122a). To arrive at a daily profit, you obviously have to know how long the voyage will take.

All of the above factors are *substantial* variables, and greatly affect profits, as will be pointed out *infra*.

The ship, in asserting its claim in this case for additional lost profits during the extension period, assumed the *highest* World Scale possible, full cargoes, voyages between ports with very favorable base freight rates, ideal weather and lengths of voyages, and unrealistic bunkering expenses, for a time when bunker costs were increasing at a rate that was extraordinary and unprecedented by itself (Exh. 14, 76a, 81a, 184a, 185a, 104a, 105a, 109a, 110a, 111a, 112a). Thus, the District Court stated as follows:

> ". . . this Court finds plaintiff's proposed calculations for profits lost as a result of the charter term extension to be highly speculative, and have been based on questionable assumptions of unforeseeable facts, admitted errors and have not been established with *reasonable or any* certainty by the evidence." (244a, 245a) (Emphasis added)

The owners of the CAPETAN MATHIOS are attempting to recover a windfall profit out of their shipowning operations by pursuing their unprecedented claim and theory for additional lost profit during the extension period.

The CAPETAN MATHIOS, owned by Compania Pelineon de Navegacion, S.A., a Panamanian corporation, operated and managed out of Athens and London, was only one vessel in the twenty ship Fafalios Group or Fleet of vessels (119a, 215a, 216a, 217a). There were five tankers in this fleet: the CAPETAN MATHIOS, CAPETAN LUKIS, MARIONGA, ANGELA F, and NEATYHI. Their cargo carrying capacities varied from 18,000 to 30,000 tons (40a).

The ownership of the controlling shares of the corporate owners of the CAPETAN LUKIS and CAPETAN MATHIOS was identical (Exh. Bc). The interlocking and common directors and officers of the corporate owners of the five tankers is obvious (Exhs. D, D1, Bc, Bd—119a). Both opposing counsel and Mr. Hatgis refer to the "owners" of the CAPETAN MATHIOS as being the "owners" of the MARIONGA (Exh. Z, Tr. p. 163). For most of the last 25 days of the off-hire extension of the time charter of the CAPETAN MATHIOS, both the MARIONGA and the CAPETAN LUKIS were under repair. The MARIONGA was in a shipyard from October 24 to November 18, 1973. The CAPETAN LUKIS was in a yard from October 16 to November 15 (124a, 150a). It is clear that the MARIONGA repairs were not seaworthiness repairs. She had just completed two voyages under a two voyage consecutive charter agreement, after she touched bottom at the beginning of the first voyage. She completed the two voyages without any problem whatsoever (Exh. H; 122a-125a). Mr. Hatgis suggested that the MARIONGA might have gone into drydock for general repairs and classification drydocking (125a). We have not had the benefit of any testimony or evidence submitted by the plaintiff as to what the repairs of the CAPETAN LUKIS consisted of, or why the MARIONGA or CAPETAN LUKIS were not used during the extension period of the time charter of the CAPETAN MATHIOS to take up or mitigate the alleged lost profit of the CAPETAN MATHIOS during the extension period.

Given the interlocking nature of the corporate ownership, directorates and officers of the vessels in the Falfalios Group or Fleet, and given the identical management and operating agency representation of the vessels (which even went so far as to have the vessels under one "fleet policy" (40a, 41a, 119a, 222a)), the Falfalios Group must have been operated as a fleet, and decisions, as to how individual vessels were chartered, were not made and could not have been made without considering what the other vessels in the fleet were doing or how they were fixed into charters (Tr. pp. 1, 42-44, 38a, 39a, 40a). It is clear, for example, that the ANGELA F (a tanker with a cargo carrying capacity of 24,000 tons (46a)) went under a time charter that was fixed and agreed upon in June 1973, and was delivered for work under the time charter on October 12, 1973 (119a-121a). Mr. Hatgis testified at one point that the calculation he made relative to the question of when or whether the CAPETAN MATHIOS should go to voyage charters or continue under a time charter after the conclusion of the time charter with Gulf Oil Corporation, was made in May or June 1973 (23a, 107a). Thus, the decision to put the ANGELA F on time charter was made about the same time that the decision was made to put the CAPETAN MATHIOS into the voyage spot market, and the ANGELA F started operating under a time charter about one month before the CAPETAN MATHIOS was put into the voyage market. The CAPETAN MATHIOS sometimes operated under time charters, and sometimes operated under voyage charters (46a).

One of the reasons why vessel owners go into time charters, which yield substantially lower profit than voyage charters at times of high voyage rates, is the security and constant and known amount of income that a time charter gives a vessel owner (117a). Some vessel owners also put part of a fleet into time charters, and part into voyage charters, to "hedge their bets" in a sense, having some security in the time charters, and some ability to take advantage of rises in the spot voyage market (118a).

The decisions to enter into the long term time charter with Gulf Oil Corporation, and put the CAPETAN MATHIOS

into the voyage market after the conclusion of the time charter, were made abroad. Just who made the decisions was not known to Mr. Hatgis (12a, 13a, 24a, 43a, 114a, 181a). The ship did not produce any evidence or witness to show who made the decision to put the CAPETAN MATHIOS into the voyage market, what considerations went into the decision, and what would have been the decision if the ship had been returned about November 1, or 5, 1973 (43a, 44a, 117a; Tr. p. 199).

POINT I

The District Court did not err in finding that the ship's provable damages included loss of use or lost profit in the amount of $81,681.49 for the time the ship was delayed and/or under repair by reason of the casualty, and in denying the ship any recovery for any wholly remote, speculative, unforeseeable, and unproven lost voyage charter profit allegedly sustained by the ship during the last days of the time charter.

When a vessel is operating under a long term time charter, and goes off-hire during a delay or repair period by reason of a casualty caused by a third party, the proper measure of the loss of use, lost profit, or lost charter hire the ship is entitled to recover, is the charter rate in the existing time charter.

> *The El Monte,* 252 Fed. 59, 64 (5th Cir. 1918), cert. den. 248 U.S. 573 (1918);
> *Sabine Transportation Co. S.S. Esso Utica,* 1955 A.M.C. 2102, 2106 (E.D. Texas 1955);
> *The Aguidale,* 61 F. Supp. 191 (S.D.N.Y. 1945), aff'd 153 F.2d 869 (2d Cir. 1946), cert. den. 328 U.S. 835 (1946);
> *Quevilly-Sampson,* 1938 A.M.C. 347 (S.D.N.Y.);
> *The Belgenland,* 36 Fed. 504, 505, 506 (S.D.N.Y. 1888).

The District Court awarded the ship in the instant matter a recovery for lost profits and loss of use in ac-

cordance with the above authorities. As to the claim of the ship for still additional lost profits during the extension period, the District Court found as follows:

"34. The loss of profit allegedly sustained by plaintiff in the extension period of the time charter was too unforeseeable, remote and speculative to properly be considered as consequential damages recoverable in this tort action. Moreover, plaintiff has not proven any such damage with the reasonable certainty required in a case where a party is seeking a recovery for lost profit.

35. The remote, unforeseeable and speculative nature of the claim for lost profit during the extension period may be seen by considering the following:

a) The very existence of the off-hire extension option in the time charter was a matter of negotiation between the charterer and owner.

b) It would not have been unusual for the above clause to have been stricken during the negotiations, and not be a condition under which the vessel was chartered. In addition it has not been shown that defendant had any idea of what kind of charter the tanker was being operated under and it could have been under a voyage charter or even a bareboat charter for all anyone knew or anticipated.

c) It was always uncertain, up to late June of 1973, when the charterer exercised its option, as to whether, when or how the charterer would exercise its option.

d) The rise in the market between April 1973 and September and October of 1973 was unprecedented in recent years.

e) The amount of off-hire to be added to the time charter period was a matter to be evaluated and presented by the charterer, and considered and evaluated by the owner, with any differences to be negotiated out between the two. In addition,

off-hire occurring even after the repair period could have effected the time the owner got back his vessel after an off-hire extension, as it did.

f) The time when the vessel should or would have come back to the owner but for the Tumaco casualty is most speculative, given problems of overlap/underlap under the law and chartering practice, any disputes that might have resulted, and a dispute that actually did take place at the end of the time charter in question in late November of 1973.

g) There were great fluctuations, and much instability in the voyage world scale rate from day to day, or even within the same day, around the time when the owners might have gotten the vessel back, but for the Tumaco casualty.

h) Applying a 'but for' test to see how the Tumaco casualty effected the subsequent chartering history and/or economic loss or gain of the owner might require following the history of the vessel to the end of its service or career for the plaintiff. See *The Soya,* 1956 Lloyd's List Law Reports 557.

i) The gross uncertainties as to what world scale rates, what ports, how much cargo, how much bunkers would have cost, and how long the voyages of the vessel would have been, if voyage charters were made by the vessel during the extension period." (260a, 261a)

The ship does not take issue with any of the above quoted facts as being wrong, unsupported by the evidence, or "clearly erroneous". The ship simply states that the rule in this Circuit is ". . . that damages need not be foreseeable in order to be recoverable . . ", citing *Petition of Kinsman Transit Company,* 338 F.2d 708 (2d Cir. 1964), cert. den. sub nom., *Continental Grain Co.* v. *City of Buffalo,* 380 U.S. 944 (1965) (Appellant's Brief, p. 10). Such is *not* the law in this Circuit, and is a distortion of what this Court said in the first *Kinsman* (*Kinsman I*) decision.

Moreover, a careful and realistic understanding and reading of the case, and the language of this Court in *Kinsman I*, cited by the ship, and this Court's later action and opinion in *Kinsman* (or *Buffalo Bridge* litigation, as it is commonly called), clearly supports Judge Boldt's finding that any alleged lost profit of the ship during the extension period was unrecoverable.

In *Kinsman* the owners of a ship, the operator of the dock at which the ship was moored, and the City of Buffalo were held at fault for physical damage sustained by other vessels, the City, and shore side property interests. The damage was sustained when an accumulation of ice and current caused the moored vessel to break loose from her berth. The vessel struck and freed another moored vessel, and together the vessels drifted down river to strike other vessels. Ultimately, the City's bridge, that had not been opened, was struck. The dam created by the vessels and the wreckage of the bridge resulted in a backup of ice. The river overflowed, thereby damaging the owners of property along the shore line.

The Court stressed that the damages were recoverable because they were "direct", and were the result of the same forces (i.e. the current and ice) that required the exercise of greater care by the responsible defendants. The Court did *not* hold that the factors of foreseeability, or proximate cause, or remoteness, or directness of damage, or speculation, were no longer relevant in determining what damage is recoverable in a tort action. The Court stated:

> "This does not mean that the careless actor will always be held for all damages for which the forces that he risked were a cause in fact. Somewhere a point will be reached when courts will agree that the link has become too tenuous—that what is claimed to be consequence is only fortuity . . . perhaps in the long run one returns to Judge Andrews' statement in Palsgraf, 248 N.Y. at 354-355, 162 N.E. at 104 (dissenting opinion). 'It is all a question of expediency, * * * of fair judgment, always keeping in mind the fact that

> we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind.' " (p. 725)

Moreover, the *Kinsman* litigation continued, resulting in the later decision of *Kinsman T. ·nsit Company,* 388 F.2d 821 (2d Cir. 1968) (*Kinsman II*). This later decision went to the question of whether two specific items of claimed damage were recoverable, based upon this Court's earlier decision on liability. The two items of damage involved were:

1) The claim by an owner of cargo stored on a vessel moored in the river, for the extra cost of getting other cargo delivered to a purchaser in a timely fashion, *pursuant to its contractual obligation with the purchaser.* The cargo intended for the purchaser, but stored on a vessel in the Buffalo River, could not be moved or delivered because of the tortious blockage of the river; and

2) The extra cost of unloading cargo incurred by a vessel that was moored on the river. The vessel was moved away from her unloading berth, and could not return to same, by reason of being struck by one of the drifting ships. The vessel owner was obligated to deliver the cargo, *pursuant to contractual obligations with cargo interests.*

This Court, rather than decide the case on grounds dealing with the scope of liability for negligent interferences with contract, considered the issue to be—what damage was recoverable from the tortfeasors in terms of foreseeability, directness, remoteness, legal cause and proximate cause. The Court denied any recovery for the above extra expenses or losses which resulted from the claimants' being required to fulfill existing contractual obligations. This Court affirmed the District Court's denial of said damages, as follows:

> ". . . recovery was properly denied on the facts of this case because the injuries to Cargill and Cargo Carriers were too 'remote' or 'indirect' a consequence of defendants' negligence.

> Numerous principles have been suggested to determine the point at which a defendant should no longer be held legally responsible for damage caused 'in fact' by his negligence. See Prosser, supra, 282-329; 2 Harper and James, supra, 1132-61; Hart and Honore, Causation in the Law, chs. VI and IX (1959). Such limiting principles must exist in any system of jurisprudence for cause and effect succeed one another with the same certainty that night follows day and the consequences of the simplest act may be traced over an ever-widening canvas with the passage of time. In Anglo-American law, as Edgerton has noted, '[e]xcept only the defendant's intention to produce a given result, no other consideration so affects our feeling that it is or is not just to hold him for the result so much as its foreseeability' Legal Cause, 72 U.Pa. L.Rev. 211, 352 (1924). E.g., Brady v. Southern Railway Co., 320 U.S. 476, 483, 64 S.Ct. 232, 88 L.Ed. 239 (1946).
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> On previous appeal we stated aptly: 'somewhere a point will be reached when courts will agree that the link has become too tenuous—that what is claimed to be consequence is only fortuity.' 338 F.2d at 725. We believe that this point has been reached with the Cargill and Cargo Carriers claims." (pp. 824, 825)

A critical factor in denying any recovery for the damages in question was the point that they arose by reason of an existing contractual obligation of the claimants, and were remote and indirect, in terms of time and space, from the casualty itself. They were not caused by the force that gave rise to the requirement that the defendants were to exercise care. The Court, in fact, acknowledged that the "foreseeability" of the damages claimed for the extra expenses was probably greater than the "foreseeability" of the damage sustained by upriver shore side claimants.

The reported case that deals most closely with the position taken herein by plaintiff is the English case of *The Soya,* 1956, 1 Lloyd's List Law Reports 557 (Court of

Appeal), which applied a measure of damage equivalent to granting the plaintiff vessel owner a recovery for loss of use based upon the charter rate in the charter party applicable and in existence during the repair period. The DIRPHUYS, 30% at fault in a collision with the SOYA, sought recovery of lost profits allegedly caused by a detention of 20 days. At the time of collision (30 December 1950) the DIRPHUYS was bound for London to load for Bombay under Charter No. 1. Repairs were effected at Rotterdam between January 1-20, 1951, and the vessel proceeded into Charter No. 1. During the repair period, on 18 January 1951, DIRPHUYS' owners entered into Charter No. 2, with a vessel to be later named to be ready to load at Dungun, Malaya, for Japan on 17 March, 1951. DIRPHUYS was later named as the vessel on 1 February 1951, and because of the repair period was unable to arrive at Dungun until 31 March 1951, but was nonetheless able to perform under the agreement. The daily net profit under Charter No. 1 was £144 3s. 10d. and under Charter No. 2 was £819 17s. 4d. From December 1950 onward there was a remarkable rise in charter rates, especially in Far Eastern waters. Plaintiff argued that since the vessel lost 20 days before loading in London, she was 20 days late in arriving at Bombay and, therefore, lost 20 days profit at the high rates then prevailing in the Far East.

The Court of Appeal rendered its decision against the plaintiff's contentions. Damages were determined on the basis that since the voyage under Charter No. 1 required 20 extra days, and the owners could have earned under the charter a net profit of £8939 16s. 5d. in the contemplated 62 days, this amount should be divided by the 82 days actually required, whereby the vessel earned £109 0s. 5d. per day. £144 3s. 10d. less £109 0s. 5d. showed a loss of £35 3s. 5d. per day, which was to be multiplied by 82 days to arrive at plaintiff's recovery.

The full profit of Charter No. 1 had been earned by the vessel, albeit over a longer period of time. The same was true under Charter No. 2 and two successive charters thereafter. What the plaintiff sought, in the words of

Lord Evershed, was "that the damage suffered should have been treated as the loss of 20 days of 'fishing' in these profitable waters at a rate equivalent to the rate of freight earned under Charter No. [2], or, alternatively, at an average, taking all the charters [Nos. 1-4] together." (p. 560) In short, the DIRPHUYS sought even less than what the CAPETAN MATHIOS seeks, and DIRPHUYS' owners actually obtained a charter (No. 2) during the repair period to which the DIRPHUYS was nominated during the vessel's fulfillment of Charter No. 1. The court considered the plaintiff's argument to be wholly within the realm of speculation. Whether the owners would have been any better off if the vessel had arrived as contemplated (20 days earlier) was deemed a matter of complete speculation. All the charters to which the vessel was committed were, in fact, carried out "*and to see what profit (if any) was lost, you would have at least to go on examining the commercial history of the ship until the end of her life, a plainly impossible task.*" (emphasis added) (p. 560).

Lord Justice Jenkins could allow as damages "the loss of earnings under any engagement for another voyage which the ship had secured at the time of the collision but was thereby prevented from performing", but went on to observe that like the present case "The DIRPHUYS lost no actual engagement existing at the time of the collision under which but for the collision she would have been employed at the daily rate of profit claimed by Mr. Carpsmael (DIRPHUYS' counsel)" (p. 565). The Lord went on to comment:

> "Assuming in Mr. Carpsmael's favour that there was a corresponding and consequential postponement of the performance of each subsequent engagement, I cannot see that the plaintiffs could be said to have thereby sustained the loss he claims on their behalf, or indeed any loss in the event of freight rates remaining constant or continuing to rise. In the event of freight rates falling, a stage might be reached at which the plaintiffs could point to a particular engagement and say: 'If this engagement had been negotiated 20 days earlier, we could have had it on bet-

ter terms.' On the other hand, any fall in rates might have been counteracted by the fixing of the terms of a charter-party for a long voyage while the rates were still high. It is important to remember that the rate for a given voyage is determined at the date (up to perhaps two months in advance) on which the terms of the charter-party are fixed, and not at the date when the voyage is begun. Furthermore, in the event of freights continuing to rise, it might be to the advantage of a shipowner to postpone for a time the conclusion of a charter-party for a given ship in the expectation of an improvement in the terms obtainable. *Even if the plaintiffs should be regarded as having made out the loss, in the shape of curtailment of profit, on which they rely, I do not think it can reasonably be held to be a direct and natural consequence of the collision. It was the result of an unpredictable fall in the Far Eastern freight market, which did not make itself felt until after the Dirphuys had completed at least three highly renumerative voyages since her arrival in Bombay. The contrary view, so far as I can see, must result in the postponement for an indefinite period, perhaps to the end of the ship's career, of the point of time at which the loss, if any, due to the 20 days' detention, could be ascertained, and the ultimate result in terms of profit or loss would necessarily be influenced, or indeed determined, by causes and factors wholly independent of the collision.*" (p. 566) (Emphasis added)

His conclusion was that the loss of the profit claimed was "*too speculative and too remote to be taken into consideration as a consequence by law of the detention in respect of which this claim arises*" (p. 566) (emphasis added). Lord Justice Hodson agreed that the proper measure of damages was "the loss of profit attributable to the particula venture on which the ship was actually engaged for the time being in this case" (p. 567). See also: *Agwilines Inc.* v. *Eagle Oil and Shipping Co. Ltd.*, 153 F.2d 869, 870 (2d Cir. 1946), cert. den. 328 U.S. 835 (1946); and *The Federal No. 2*, 21 F.2d 313 (2d Cir. 1927).

We submit that under the facts of this case, and the above authorities, any alleged lost profit during the extension period was too remote, too tenuous, too indirect, too unforeseeable, and too speculative to be recoverable in this tort action. The District Court was certainly not "clearly erroneous" in finding the unforeseeability, remoteness and speculation it did with respect to this item of damage.* There were numerous factors and forces that acted and/or came into being during the period of over a year between the casualty and the extension period. There was the existence of the several options in the time charter to begin with; the various off-hire periods; the evaluation of what off-hire should be claimed and/or accepted; and negotiation of the off-hire periods; the exercise of the options; the Arab-Israeli war of October 6, 1973; the oil embargo and/or cutback in production; the unprecedented rise in the charter market; and the extraordinary instability of market conditions during the extension period, to mention but a few. Under these circumstances, the casualty of September 1972 was not the "legal" or "proximate cause" of any alleged lost profit during the extension period in November 1973. See generally: *Harper & James, The Law of Torts*, Vol. 2, 1956, Chap. XX, pp. 1108-1161, and in particular pp. 1141-1143; and *Prosser, Law of Torts 1971*, Chap. 7, pp. 236-290, and in particular pp. 250, 252, 253, 263-267, 270-272.

There is, of course, the additional problem of how far the Court should go in following the economic results of the extension period as discussed in *The Soya, supra.* Who is to say that the extension period did not result in a number of *better* charters or less idle time after November 24, 1973, than would have been the case had no extension been requested? Who is to say that the extension period did not result in, or was not related to, the vessel owners putting a different ship into the time charter market, which

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* The District Court's findings on damages, and the issues of proximate cause, are governed by the "clearly erroneous" test of F.R.C.P. 52(a):

McAllister v. *U.S.*, 348 U.S. 19, 22, 23 (1954);
Neal v. *Sago Shipping Co. S.A.*, 407 F.2d 481, 489 (5th Cir. 1969), cert. den. 395 U.S. 986 (1968);
U.S. v. *Ebinger*, 386 F.2d 557, 560 (2d Cir. 1967).

turned out to be the most profitable market to be in since November of 1973?

Finally, a Court in determining what type of alleged damage should be considered to be too remote, too indirect, etc., to be recoverable, should (as this Court did in *Kinsman I* and *II*) take into account the realities, fairness and equities of the situation confronting it. Thus, in *Kinsman I* the shore side property owners would have borne all their damage without recourse against anyone, if their damage was held to be too remote, indirect, etc. (338 F.2d 726). In the instant matter the shipowner is not being asked to bear its own damages. The shipowner has received $180,090 for its hull damage, and the District Court held that the ship's recoverable damage also included loss of use and lost profits in the amount of $81,681.49.

Plaintiff is asking that its damages be based upon *voyage* rates when it was actually completing a long term *time* charter. Such a bootstrap attempt to reap a windfall profit should not be permitted. For the last part of the time charter, the ship wants to have its cake and eat it, i.e. having received the benefit of the certain income from the time charter, the ship is trying to advance an unprecedented theory to obtain some additional indeterminate amount that someone might have made if they had been playing the voyage spot market.

POINT II

The District Court did not err in finding that although the owner of the Capetan Mathios did prove that it sustained an actual loss of use or loss of profit during the delay at Tumaco and the repair period of the vessel, it failed to prove (A) that it sustained any lost profit during the extension period, and (B) failed to prove the amount of any such alleged damage or lost profit with any certainty and/or any reasonable certainty.

The District Court stated as follows in its Oral Opinion:

> "In considering lost profits the inquiry is 'not whether they could possibly have been made, but is whether

they would have been made.' In the North Star, 151 F. 168, 175 (2d Cir. 1907). It is necessary to show that profits 'have actually been or may reasonably supposed to have been lost.' That is from the Supreme Court in The Conqueror, 166 U.S. 110, 125 (1897)

* * *

Reimbursement for detention is allowed where potential profits have been lost because of loss of use. Such potential loss cannot be speculative, but must be established with reasonable certainty. Again, The Conqueror is cited for that. 166 U.S. 110,

* * *

this Court finds plaintiff's proposed calculations for profits lost as a result of the charter term extension to be highly speculative, and have been based on questionable assumptions of unforeseeable facts, admitted errors and have not been established with reasonable or any certainty by the evidence. Further, market conditions prevailing during the claimed damage period were very extraordinary and uncertain making it difficult, if not impossible, to approximate profits with any degree of certainty." (241a, 242a, 244a, 245a)

The District Court also adopted the following:

"37. Under the facts of this case the 'actual loss' of the plaintiff cannot be considered to include any alleged los[t] profit during the extension period, and no such 'actual loss' has been proven to the satisfaction of the Court. *The Conqueror*, 166 U.S. 11 (1897), and The *North Star*, 151 Fed. 168 (2d Cir. 1907)." (262a)

The ship attempts to picture the District Court as having denied any recovery to the plaintiff for lost profits. However the District Court did hold that the recoverable damages of the ship included $81,681.49 for lost profit during the repair period, as measured by the time charter rate. No lost profit damages were shown by the ship to be caused by the casualty of September 1972 because of the remoteness, tenuous connection, indirectness, and unforeseeability referred to in Point I herein. The possibility of the vessel having gone to a time charter (rather than to

voyage charters), and the failure of the ship to use its other vessels to mitigate its damage during the extension period, also go to the question of whether any loss of profit was proven by the ship during the extension period.

The authorities referred to by the ship on the point of certainty of damage and certainty of amount were cases where the *fact* of damage caused by the defendant was proven, and the choice was between the plaintiff making no recovery, or a recovery on a reasonable evidenciary basis that was present in all the cited cases. They are inapposite to this case. The District Court in this case did award the ship loss of profit damages, and refused to award loss of profit damage for a time when the *fact* of damage caused by the casualty was not proven.

Moreover, even when a plaintiff has proven the *fact* of damage caused by defendant, plaintiff must ". . . show the amount of his damages with reasonable certainty." *W. L. Hailey & Co.* v. *The County of Niagara*, 388 F.2d 746, 753 (2d Cir. 1967). The authorities cited on this point by the District Court and by appellant, at pages 12 and 13 of its brief, are in accord.

Moreover, even if the fact of some damage caused by the defendant is proven, a Court cannot and should not award damages to a plaintiff on the basis of complete speculation and guesswork, and there must be a rational and reasonable basis for the computation of damages. *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, 264 (1946); *Eastman Kodak Co.* v. *Southern Photo Co.*, 273 U.S. 359, 379 (1925); *Shannon Shaffer Oil & Ref. Co.*, 51 F.2d 878 (10th Cir. 1931).

The District Court was entirely correct in refusing to enter into an exercise involving complete guesswork and speculation, especially when the damages of plaintiff for any alleged lost profit during the extension period were so patently based upon:

> ". . . questionable assumptions of unforeseeable facts, admitted errors and [were not] established with *reasonable or any* certainty by the evidence." (245a) (emphasis added)

The magnitude of the speculation and guesswork proposed by the ship below, and continued on appeal, can be appreciated by carefully looking at just how the ship's claim was really calculated for alleged lost profit during the extension period.

Mr. Hatgis, who made the calculations upon which the ship's claim for $303,297.05 was based, assumed that the vessel would have been returned to her owners on October 25, or October 27, 1973, at the latest, if the Tumaco casualty had not occurred, and that the agreement of charter would have been entered into in early to mid-October 1973 for the first of two voyages at World Scale 450, and would have been chartered at World Scale 300 for the second voyage (26a, 31a, 34a, 100a, 104a, 105a). All of these assumptions were improper.

We have already shown that the vessel would have been returned (on a "but for" Tumaco theory) at the earliest by November 1 (or November 5, based upon the four-day repair period reduction), and that the normal thing would have been to "fix" the vessel (enter into a charter agreement) only several days prior to its availability. Moreover, the application of "overlap/underlap" could have resulted in a return substantially later than November 5, 1973 for the first of the ship's two hypothetical voyage charters. On the question of overlap/underlap, see 1975 *The Law of Admiralty*, Gilmore & Black, 231, 232; *Poor on Charter Parties*, 5th Edition, pp. 10-16; *The Rygja*, 161 Fed. 106 (2d Cir. 1908); *Straits of Dover S.S. Co.* v. *Munson*, 95 Fed. 690 (S.D.N.Y. 1899); *Cia de Nav. Julia S.A.* v. *Marchessini & Co.*, 1959 A.M.C. 1572 (S.D.N.Y. 1959); *The Federal Voyager*, 1955 A.M.C. 880 (Arb. N.Y. 1953); and *The Almo Shipping Corporation of Monrovia* v. *Otello Mantovani*, Lloyd's List, November 30, 1973, p. 2 (not officially reported).

As shown earlier, by October 26, 1973, the high rate of 450 World Scale, or anything like it, was a thing of the past. Thus, the ship's proposed use of a World Scale rate of 450 for the first itious voyage, and a 300 World Scale for the second voyage (or an average of 375 as the ship tries to assert this time around) was preposterous.

In order to estimate what net profit a vessel owner will earn per day on a voyage charter, one must know a certain number of things:

(1) The World Scale at which the vessel will be chartered for;

(2) The ports which the vessel will move between, in order to know what base freight rate will be applied to the voyage in question;

(3) The amount of cargo to be carried;

(4) The amount of time the voyage will take;

(5) The amount of expenses such as bunkers, and port charges, and other owner's expenses, such as wages, etc., that will be incurred. (Tr. pp. 83, 84, 91, 96, 97, 98, 99, 100)

Mr. Hatgis admitted that the World Scale rates he assumed were the *highs* for the dates or periods during which he assumed the charters for the two fictitious voyages were fixed in coming to his $303,297.05 figure (104a, 105a). Mr. Hatgis' demeanor and credibility were, of course, adversely commented upon by the District Court (238a, 239a). He was charged by the vessel owner with the responsibility of overseeing the prosecution of the claim asserted in this case by the ship (43a).

All the calculations on Exhibit 14 (the exhibit containing alleged daily profits for Caribbean voyages at World Scale 100, 150, 175, 200, 225, 250, 275, 300, 325, 350, 375, 400, 425 and 450) which were the figures used by Mr. Hatgis in coming to an alleged amount of profit of $358,000.00 for World Scale 375, were all based upon voyages between Puerto La Cruz to Philadelphia to Puerto La Cruz (89a). Such a run or voyage is obviously a profitable one as compared to voyages between other United States/Caribbean ports as will be shown.

All the calculations in Exhibit 14 were also based upon a full cargo of 29,155 long tons, whereas the three voyages of the CAPETAN MATHIOS after the vessel was returned to her owners involved the carriage of 27,338 tons, 28,048 tons, and 28,390 tons of cargo and no "dead freight" was earned (Exhs. E, F, and G, 86a-88a).

The gross "padding" of the claim as presented can be readily observed when comparing it to the result of the very first voyage taken by the CAPETAN MATHIOS after the vessel was returned to her owners in November of 1973 (Exhibit E). On the latter voyage the vessel made a trip between Aruba/Pensacola, Florida/Bajo Grande, under a charter dated November 8, for World Scale 300. The base rate for such a voyage was $1.75, which translated to $5.25 per ton of cargo at World Scale 300 (as compared to a base rate of $2.13 assumed throughout Exhibit 14, which translated into a freight rate of $6.39 per ton at World Scale 300 (90a)), and the CAPETAN MATHIOS carried only 27,338 long tons of cargo on said voyage (Exhibit E and Exhibit 14). To accomplish the Aruba/Pensacola, Florida/Bajo Grande voyage, it took 13 days, and the vessel owner agreed to a demurrage payment of only about 1/10th of a day. (See the demurrage payment of $1,364.07 on the third page of Exhibit E, and the $10,476 demurrage daily rate—paragraph I—on the 11th page of Exhibit E, which is the first page of the applicable charter party.) The profit for the trip was $7,331.27 per day at a World Scale of 300, as compared to the $10,823.00 daily profit calculated in Exhibit 14 for World Scale 300, and asserted by plaintiff (76a, 78a, 79a).

In addition, the figures of Exhibit 14 assumed bunkering expenses of $16,100.00 per voyage, when the bunkering expense on the first voyage, after the vessel came off the time charter, was $24,288.00; the voyage thereafter cost slightly *less* per ton of bunkers, but a total of $26,104.90; and the voyabe thereafter resulted in a bunkering expense of $30,000.00 (Tr. p. 157, Exhs. E, F & G).*

All of Mr. Hatgis' calculations were based on theory. In practice, and as much as he tried to avoid admitting it, voyages between certain ports are more profitable, at the

* Just what bunkers would have cost plaintiff, had the ship been able to get them for the CAPETAN MATHIOS in late October and November, is completely speculative. Under the time charter party, Gulf Oil Corporation provided the bunkers. Mr. Hatgis testified that vessel owners were paying up to $100 or $120 per ton for bunkers in November 1973 (Tr. p. 156).

same World Scale, than voyages between other because of the greater probability of delays resulting from bad weather, rough seas, etc., for which vessel owners do not receive demurrage (83a, 85a, 112a, Tr. pp. 160, 243). In the fantasy world of Exhibit 14, there is no rain, no fog, no rough seas, and no delays for which the owner could not recover demurrage. The real world is to the contrary. Mr. Hatgis admitted that his figures did not allow for any contingencies (Tr. p. 160). Again, as Mr. Hatgis himself testified, relating to the time which a voyage from Puerto La Cruz/Philadelphia/Puerto La Cruz could take:

> "Normally, for a vessel of this type it is a five day trip up. If there is no congestion at Puerto La Cruz Terminal, you would get in and out in one day, and if there is no congestion in Philadelphia you would come in and out in one day again.
>
> So, *the minimum* that the trip should take is twelve days. As I mentioned Friday, we always calculate one extra day to cover the laytime allowed, which is seventy-two hours. The charterers are allowed to load and discharge the vessel, so we allow in our estimates three days, and we hope it will do it in twelve. But it is very possible many times that we might have bad weather, and instead of making the trip up in five days, we might make it in seven days. Or it is possible that the vessel has to wait for another vessel to discharge at the terminal of the oil company, so she might wait five days to discharge." (111a)

A party seeking to present another obviously speculative version of one of the ways the CAPETAN MATHIOS might have been operated, assuming she had been returned to her owners on November 1, 1973, and had gone into the voyage market, could theorize the following:

(a) Assume a voyage initially fixed at World Scale rate of 300,* as a similar vessel was fixed on October 26, 1973

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* The Sea Brokers Inc. reports (Exh. Y) and the Market Research Inc., and Dietze Inc. reports (part of Exh. 13) support a hypothetical World Scale rate of even less than 300, say 250, for

(footnote continued on following page)

for delivery on November 1, 1973, for a voyage lasting 13 days (it could just as easily be fourteen days, or more) at a base rate of $1.75, carrying 27,338 long tons of cargo (similar to the time and base rate experienced in the first voyage of the CAPETAN MATHIOS after she was returned to her owners as set forth in Exhibit E). This would result in the following speculative figures:

1)	Gross freight earned: $1.75 x 3.0C (300 World Scale) or $5.25 per ton x 27,338 long tons	$143,524.50
2)	Less 1 ¼% Brokerage Commission ..	1,794.05
		$141,730.45
3)	Less all expenses as incurred on the first voyage after the time charter was concluded, as set forth in Exhibit E	$ 47,788.00
4)	Profit for voyage	$ 93,942.45
5)	Average profit per day, assuming a 13 day voyage	$ 7,226.34

(b) Assume a second charter fixed about November 9 at the rate of World Scale 225. Using the same rate, ports, time and cargo carried as in (a) above, the figures for the second voyage would be:

1)	Gross freight earned of $1.75 (225 World Scale) or $3.9375 per ton x 27,338 long tons	$107,643.38
2)	Less 1 ¼% Brokerage Commission ..	$ 1,345.54
		$106,297.84
3)	Less all expenses incurred on the first voyage after the time charter was concluded (Exh. E)	$ 47,788.00
4)	Profit for voyage	$ 58,509.84
5)	Net profit per day, assuming a 13 day voyage	$ 4,500.76

(footnote continued from preceding page)

a similar sized vessel fixed October 26, for the same trade, for delivery November 1 or 2. Even Mr. Hatgis agrees to a World Scale rate of 300 for about November 1 (71a, Tr. p. 215).

If one would continue the above exercise to see what the lost profit might have been during 21.179 days of the extension period (since owner's work took four days), the result would be as follows:

Profit for first 13 day period ($7,226.34 x 13)	$ 93,942.42
Profit for remainder of time: ($4,500.76 x 8.179)	$ 36,811.72
	$130,754.14
Less profit made under time charter of $2,179.36/day (21.179 x $2,179.36)	$ 46,156.67
	$ 84,597.47

The above is a far cry indeed from the alleged $303,297.05 alleged difference in profit sought by the ship (apparently increased on appeal to $335,000—Appellant's Brief p. 6). Small wonder that the Court found as it did.

The above is not to say that this Court should adopt the speculative figures inherent in measuring damages under plaintiff's proposed theory. If we wanted, we could have assumed lower World Scale rates for the dates assumed based upon reported fixtures in Exhibit 13. In addition, if one were to assume a November 5 return date (consistent with the position that four days of the repair period were not attributable to the casualty)* the above $84,597.47 figure would be reduced substantially since the market rate was continuously dropping. A further substantial theoretical reduction would also be possible from any possible "overlap" beyond a November 1 or November 5 date.

For the Court to have picked a figure out of the air, or from a hat, within a spread of from 0 to $84,000 or any other amount, would have been pure guesswork, rather than anything remotely resembling a rational or reasonable evidentiary basis for awarding damages. Clearly the ship failed to prove any alleged lost profit damage during the extension with any certainty or any reasonable certainty as it was required to do.

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* And/or the intended yard period in summer '73 or after the time charter (188a, 132a-136a, 138a).

The ship also failed to prove that it sustained any actual or recoverable lost profit based upon theoretical voyage charter rates during the extension period by: (a) failing to show why the CAPETAN LUKIS or MARIONGA were not used to mitigate and/or avoid any such alleged loss; and (b) failing to show how, why, and by whom, the decisions regarding the chartering of the CAPETAN MATHIOS were made and/or would have been made if the Tumaco casualty had not occurred, and how these decisions related to decisions made regarding the chartering or use of other tankers in the Fafalios Fleet. *Compare Brooklyn Eastern District Terminal* v. *U.S.*, 287 U.S. 170 (1932); *Crain Brothers, Inc.* v. *Duquesne Slag Products Co.*, 273 F.2d 948 (3rd Cir. 1959); *Newtown Creek Towing Co.* v. *City of New York*, 23 F.2d 486 (2d Cir. 1928); *Sabine Transportation Company Inc.* v. *S.S. Esso Utica*, 1955 A.M.C. 2102 (E.D. Tex. 1955).

Under these circumstances, the District Court properly concluded that it would have been improper and inequitable to award the ship anything more than the lost profits sustained during the delay and repair periods. In the end, the fact of lost profit damage and/or its amount during the extension period remained a matter of complete speculation and remained totally unproven.

POINT III

The District Court did not err in awarding the ship a recovery for loss of use only for that portion of the repair period that Tumaco related repairs extended the time within which shipowner's work was or could have been accomplished, when:

(A) The ship operated normally from the time of the casualty in September 1972 to the time of repairs in April 1973;

(B) No one had any idea, believed, or knew that the ship was unseaworthy in any respect until after the vessel went into the repair yard;

(C) Prior to the casualty of September 1972, the vessel owners intended to put the vessel into drydock in the summer of 1973;

(D) The ship and her charterer agreed that a mutually convenient time for the vessel to go into the yard would be in late March and early April 1973;

(E) The shipowner simply moved up the summer yard period slightly, and sought to take advantage of the yard period to accomplish Tumaco related repairs;

(F) The vessel was not put into the yard to repair any unseaworthy condition;

(G) Substantial shipowner's work was done while the vessel was in the yard which took, or should have taken, four to seven days;

(H) The delay of the shipowner in putting the vessel into drydock after the Tumaco casualty was, as found by the District Court, "long and unreasonable"; and

(I) The District Court was unconvinced that owner's work and unseaworthiness repairs were all done concurrently.

When a vessel, *long after a casualty*, goes into a repair yard, and while in the yard accomplishes owner's work, but also repairs damage sustained in a casualty, the touchstone for determining whether any damages for loss of use are owed by the party responsible for the casualty, is whether the primary or even contributing purpose or reason for the vessel going into the yard was to do owner's work. If the primary or contributing purpose is to do owner's work, the shipowner is entitled to recover for loss of use only for the time that casualty related repairs extend the yard period beyond the time needed to do owner's work. See:

The Alabama/Dalfonn, 1967 AMC 267 (2d Cir. 1967) (not officially reported);

The Pocahontas, 109 F.2d 929 (2d Cir. 1940), cert. den. 310 U.S. 641 (1940);
Pan American Petroleum Transportation Company v. *U.S.,* 27 F.2d 684 (2d Cir. 1928);
Clyde S.S. Co. v. *City of New York,* 20 F.2d 381 (2d Cir. 1927);
Cia Punta Alta v. *Dalzell,* 1958 AMC 2016 (S.D.N.Y. 1957) (not officially reported);
The Super X, 15 F. Supp. 294 (S.D.N.Y. 1936).

Clearly, the immediacy of the necessity to repair, and the length of time between the casualty and the repair period, is a most significant factor in determining whether a vessel owner is entitled to any recovery for loss of use, assuming he can show and prove the amount of an actual loss. See the above authorities and in particular *Clyde S.S. Co.* v. *City of New York, supra,* and the comment of Judge L. Hand in *Pan American Petroleum Transportation Company* v. *U.S., supra,* at p. 685, emphasizing the importance of the repairs being carried out immediately, and clarifying the dictum in his opinion in the *Clyde* case, at p. 831, going to the question of when vessel owners are entitled to recover for loss of use. In the *Clyde* case (in which the vessel owner was denied any recovery for loss of use because the collision repairs did not extend the time within which owner's work was accomplished), there were 7 months between the casualty and the repair period, as compared to 6 months in this case.

Most importantly, it is not the fact of unseaworthiness, harped on by the ship, that is critical, but what vessel owners knew, and their reason for putting the vessel into the repair yard, that is controlling. See: *The Pocahontas, supra;* and *The Alabama/Dalfonn, supra.*

Vessel owners in this case did not know that the ship was unseaworthy, believed that the repairs they wanted to do for their own account would take 4 to 7 days, and originally thought that the Tumaco damage could be repaired during the same time (96a, 97a, 98a, 191a, 193a, 243a; Oral Decision, p. 7). The fact that the repair of

the Tumaco related damage extended the yard period, does not change the nature of the first 4 days of the yard period, in terms of whether the vessel owner can recover for loss of use for said 4 days.

Some of the relevant Findings of Fact herein of the District Court on this point (with citations to the record in support of same set forth in our footnotes) were as follows:

"3. During the several days immediately following the casualty, i.e. on September 30, October 1 and October 2, 1972, an American Bureau of Shipping surveyor (ABS being the vessel's classification society) examined the CAPETAN MATHIOS at Tumaco. At that time the mooring chain was unwrapped from the shaft and propeller of the vessel, and some damage was observed to the propeller blades and the propeller guard. The fair water cone was missing.[a]

4. Sea trials were conducted for approximately 5 hours off Tumaco in order to check for vibration or for any damage to the propulsion system. The vessel appeared to be operating normally. According to the ABS surveyor, the vessel was in satisfactory condition to proceed with her regular operations. Owners advised charterers that the vessel was seaworthy, could continue operations, and could fulfill charater commitments.[b]

5. A Certificate of Seaworthiness was given to the vessel by the ABS, with the recommendation by ABS that the damage be reexamined *at the next regular drydock period* of the vessel. The vessel left Tumaco and continued to operate.[c] (emphasis added)

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[a] 173a, 174a, 181a.

[b] 58a, 168a, 169a, 170a, 181a, 189a, Exhs. 2 and 3.

[c] 181a.

6. Prior to the casualty of September 29, 1972, the vessel owner intended to drydock the CAPETAN MATHIOS in the summer of 1973."[d]

"9. From the time of the casualty at Tumaco, in late September of 1972, to March 29, 1973, the CAPETAN MATHIOS properly performed, and was operated, under the above time charter to Gulf Oil Corporation, with no reduction of speed. No speed claim was ever made against plaintiff by the charterer for the latter period.[e]

10. At the time of survey at Tumaco, the vessel had been tipped so that the surveyor in attendance could examine the damaged propeller area. None of the items of damage noted or observed at Tumaco made the vessel unseaworthy.[f]

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[d] 188a, 132a-137a. The master of the ship testified that the ship normally went into drydock every 12 to 18 months (179a).

[e]201a, Exhs. B1-7 and Exhs. C1-4. The Master of the vessel testified that he felt some vibration after the casualty, but it was obviously so slight that he did not report same to his owners, and did not tell the ABS surveyor about it (169a, 170a, 180a). Some slight overheating and soft vibration was reported by the Master to the owners on October 23, 1972, but the owners immediately replied on October 24 that the vessel should reduce speed somewhat, if necessary, and the owners were obviously not concerned enough to make any other inquiry or get the ship into the yard for an immediate inspection (Exhs. 2 and 3). The overheating or vibration did not get worse between October 1972 and the yard period of March/April 1973 (178a). Even Mr. Pillatt (the ship's surveyor or engineering expert) had no explanation as to how or why the CAPETAN MATHIOS could have functioned without any problem for six months, except to say that "presumably, the existing damages and conditions did not cause undue vibration, loss of speed, loss of power, seal leakage" (Tr. p. 129), and went on to testify:

"Q. So your answer is that the damage that existed permitted it to so function?

A. That is correct.

Q. And the damages that existed permitted the vessel to fulfill its function as the tanker in the business of carrying cargo?

A. That is a fact." (Tr. p. 129)

[f] 13a, 14a, 59a, 60a, 94a, 173a, 174a, 181a.

11. A new fair water cone was sent from Europe and was ready for installation in New York in early or mid-January 1973. The owners and charterers conferred and decided that *a mutually convenient time* to put the vessel into a repair yard would be late March and early April 1973. Thus, *the owners slightly moved ahead the previously planned yard or drydock period of the vessel, and intended to take advantage of said drydock period to repair the damage sustaind at Tumaco.*"[g] (emphasis added)

"12. The vessel went into a repair yard in the New York area on March 29, 1973 for what was thought would be an off-hire and repair period of about one week. *The vessel did not go into the yard in March 1973 because of any known unseaworthy condition.* The vessel did not return to drydock in the summer of 1973.[h] (emphasis added)

13. After the vessel went into drydock, the propeller, tail shaft and associated equipment were examined. It was found that much more damage than originally observed, most if not all of it internal, had been sustained at Tumaco. All the damage found was repaired.[i]

14. Owner's work while in the yard consisted of (1) cleaning the vessel's bottom and underwater hull, applying two coats of paint to same, and also applying a coat of anti-fouling paint; and (2) effecting repairs to a boom and sea chest strainer equipment which was taken from the vessel, repaired in the yard's shops, and returned and reinstalled on the ship. In addition, several classification surveys that did not require a drydocking were accomplished, and the owners also took advantage of the drydocking to accomplish a classi-

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[g] 56a-60a, 189a, 190a, 234a, Exh. T.

[h] 59a, 60a, 94a, 181a, 191a, 192a Tr. p. 286.

[i] 181a, Exh. 9, Exh. 11.

fication survey due in 1974 that did require drydocking. This meant that the vessel did not have to go into drydock for classification purposes in 1974, and had until 1975 to go into drydock for classification purposes upon leaving the New York yard in April of 1973. All of the latter work was not attributable to the Tumaco casualty.[1]

15. If the above owner's work had been done alone, it would have taken about four days to one week to accomplish."[8]

The main portion of the District Court's Oral Decision relevant to the point of the 4 day reduction of the yard period for loss of use purposes, was as follows:

"In the present case, the full extent of the damages incurred in the Tumaco incident was not discovered until the vessel was placed in drydock in Hoboken, New Jersey on March 29, 1973. The Court finds the evidence insufficient to establish precisely when the vessel became unseaworthy; however, the Court finds that at some time prior to the drydocking referred to, the Tumaco casualty caused the Capetan Mathios to become unfit for sea voyage and therefore, in fact, unseaworthy.

The Court further finds that, in fact, the owners of the vessel did not know it was unseaworthy at the time it entered the drydock at Hoboken and did not put the vessel in drydock for the purpose of repairing unseaworthy conditions. While in drydock substantial repairs, not chargeable to the Tumaco casualty, were made by the vessel owners. The time required therefor was estimated at four to seven days by a competent witness called by plaintiff. In the circumstances that (1) plaintiff long and unreasonably delayed in drydocking its vessel and (2) the unconvincing evidence purporting to show that both types of

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[1] 97a, 98a, 138a, 139a, 205a, 206a, 233a, Exh. 8, pp. 13-15.

[8] 96a, 97a, 98a.

repair were made in the time required to make the unseaworthy repairs, the Court finds and holds that four days of the total repair time should be deducted in computing plaintiff's loss of profits during the drydock period at Hoboken." (emphasis added)

Thus, it is not true, and the District Court did not find, that the vessel was put into the yard as soon as the fair water cone was available; or as soon as a yard was available after the cone had arrived; or as soon as the vessel was in a position to be drydocked; or that the yard period was immediately set up after the cone arrived, as implied or stated by the ship (Appellant's Brief, pp. 4, 5, 8, 17 and 18). Repairs were, in fact, deferred until a time mutually convenient to the shipowner and charterer. Exhibit 18 does not say what the appellant says it does at the top of page 4 of its Brief. The fair water cone arrived in mid-January, but the vessel did not go into the repair yard until March 29, 1973.

It is not true, and it was not found by the District Court, that the primary or controlling purpose of the repair period was to make repairs of the damage sustained at Tumaco, as implied by the ship (See Appellant's Brief, pp. 5 and 20). It is not true, and it was not found, that "The repair period tentatively scheduled for the summer of 1973 has no bearing on the repair period required for the Tumaco repairs" (Appellant's Brief, p. 19). It is not true, and it was not found, that the ship took advantage of the Tumaco repairs to schedule and accomplish its own work (Appellant's Brief, p. 20). The exact opposite was true, and was found by the District Court, i.e., that the ship moved up its previously planned yard period, and attempted to take advantage of same to make Tumaco related repairs (251a, F.F. 11).

It is not true, and it was not found, that owner's work, while in the yard, only consisted of the boom, sea chest strainer, and steam turbine casing work (Appellant's Brief, p. 18). The vessel's bottom was not damaged in any way at Tumaco (Exhs. 9 & 11; 181a). Nevertheless, dur-

ing the repair period in March/April 1973 the vessel's bottom was cleaned, *two* coats of bottom paint were applied in the drydock, and a coat of anti-fouling paint was also applied at an expense of $7,830.00 (233a). This, by itself, would have taken three to four days (96a). In addition, owners accomplished certain classification survey requirements that did not require drydocking (98a, Exh. 5), and also accomplished a classification survey that *did* require drydocking, which made it unnecessary for the vessel to be drydocked in the following year, 1974, as the Classification Society would have required, but for the drydocking in April of 1973 (138a; Exh. 8, pp. 13-15).

It is hardly appropriate for the ship to ride roughshod over so many of the facts found by the Court going to why the vessel went into the shipyard, without pointing out why any of the Court's findings in this respect were wrong—let alone "clearly erroneous"—especially when the decision by the shipowner as to when the vessel would go into the yard, was made by someone abroad somewhere, who did not testify (114a, 125a, 133a-136a).

In addition, the District Court was unconvinced that owner's work and unseaworthiness repair were done concurrently, to wit ". . . the unconvincing evidence purporting to show that both types of repair were made in the time required to make the unseaworthy repairs . . ." (243a). The ship's surveyor, Mr. Pillatt, is the only one who testified on the repairs made. The vessel was in drydock for repairs, and repairs had commenced before he arrived on the day he first saw the ship. The following day he left the country for one or two weks (Tr. pp. 111, 114).

In our view, the District Court, was, if anything, generous to the ship in deducting only 4 days for owner's work rather than 7 days. We trust that this Court will not find the four-day reduction as "inexplicable" as the ship apparently does (Appellant's Brief, p. 18).

We submit that on the above facts and law, the District Court did not err in holding that the ship was entitled to recover for loss of use only for that portion of the repair

period that Tumaco related repairs extended the time within which owner's work could have taken (F.F. 30, 258a; Oral Decision, p. 7, 243a).

POINT IV

The District Court did not abuse its discretion in denying costs to the ship and/or deciding that each side was to bear its own costs, when: (1) the case was settled as to liability; (2) the ship had been paid $180,090.00 for its hull and engine damage under the settlement; (3) the only litigated issue between the parties was the quantum of the ship's provable damage for loss of use; (4) the District Court commented unfavorably on the demeanor and credibility of the ship's main witness on the loss of use issue; and, (5) the ship insisted that its provable damage for loss of use was in the amount of $400,374.31, but the District Court found that its provable damage for loss of use was only $81,681.49.

It is common ground between the ship and Texpet that it is within the discretion of a District Court to allow or disallow costs to the "prevailing party" under rule 54(d) of the Federal Rules of Civil Procedure (Appellant's Brief, p. 21, F.R.C.P. 54(d)). Thus, the District Court's denial of costs in this case should stand, unless the Court abused its discretion. See generally: *6 Moore's Federal Practice*, Sec. 54[5], pp. 1312-1323; and *3 Benedict on Admiralty*, Sec. 435, pp. 229-230.

In one of the cases cited by the ship on the question of the District Court's alleged abuse of discretion in not awarding costs, *Lichter Foundation Inc.* v. *Welch*, 269 F2d 142, 146 (6 Cir. 1959), the Court stated as follows, referring to Rule 54(d) of the Federal Rules of Civil Procedure:

> ". . . we believe the statute and rule were intended to take care of a situation where, although a litigant was the successful party, it would be inequitable under all the circumstances in the case to put the burden of

> osts upon the losing party. Examples will be found in cases where the amount of taxable costs actually expended were unnecessary or unreasonably large under the circumstances, where the denial of costs was in the nature of a penalty *for injecting unmeritorious issues* into the case or unnecessarily prolonging the trial of the case, *or where the judgment recovered was insignificant in comparison to the amount sought and actually amounted to a victory for the defendant.*" (Emphasis added)

The liability in the instant litigation was settled well before trial, under terms of the ship recovering 80% of its provable damages. Texpet paid the ship $180,090.00 for hull and engine damage under the settlement (255a, 257a; F.F. 23; Exh. 29). The only outstanding claim and issue litigated below was the quantum of damage plaintiff was entitled to recover under the settlement for alleged loss of use or charter hire or lost profit. The ship insisted that its provable damage for this latter item was in the amount of $469,374.31 (214a, 258a, F.F. 28). The District Court found the provable damage for loss of use to be $81,681.49. Clearly, the amount awarded plaintiff was ". . . insignificant in comparison to the amount sought and actually amounted to a victory for the defendant". *Lichter Foundation Inc.* v. *Welch*, *supra*.

A plaintiff's failure to recover most of what it has claimed in damage has always been a proper basis for an Admiralty Court exercising its discretion in denying costs to a plaintiff.

In *Higgins Inc.* v. *Hale*, 251 F.2d 91 (5th Cir. 1958), the Fifth Circuit affirmed the District Court's denial of costs to the plaintiff-boatyard when the plaintiff was held to be entitled to damages of only $805.72, as compared to an alleged unpaid repair bill and claim of $1,545.00. In *San Juan Trading Co. Inc.* v. *The Marmex*, 107 F.Supp. 253 (D.C. P.R. 1952), aff'd 212 F.2d 206 (1st Cir. 1954); cert. den. 348 U.S. 822 (1954), the Court denied costs to either party when plaintiff's recoverable damage for lost cargo

was held to be only $3,796.98, as compared to plaintiff's claim for $31,341.84. Compare also: *Sheaves* v. *Estrela Corp.*, 175 F. Supp. 484 (D.C. Mass. 1959).

It cannot be denied that the principal issue between the parties herein that caused the matter to go to trial was whether the ship was entitled to *any* recovery for alleged additional lost profit while the vessel was operating and carrying cargo at the end of the time charter with Gulf Oil Corporation. This alleged loss of profit, in the amount of $303,297.05, constituted the bulk of the loss of use claim of the ship (214a, 258a, F.F. 28). The ship recovered *no part* of this claim on its unprecedented theory to recover additional alleged lost profit on top of profit lost during the repair period and delay of the ship. Thus, the ship's insistence on ". . . injecting unmeritorious issues . . ." into an otherwise settled or settleable dispute, was, by itself, sufficient ground for the District Court's exercise of discretion in denying costs to the ship. *Lichter Foundation Inc.* v. *Welch* (*supra*).

Moreover, the ship sought to prove its alleged lost profit by the testimony of only one witness, Mr. Hatgis, ". . . the one that made the estimates of the study upon which the plaintiff's claims for damages are founded . . ." (238a; Oral Decision, p. 2). Judge Boldt stated that his appraisal of Mr. Hatgis' testimony and his demeanor ". . . leaves his credibility and the weight and significance of his testimony severely impaired, in my mind" (239a; Oral Decision, p. 3).

In reality, the District Court showed restraint in exercising its discretion, by denying costs to either side, but nevertheless awarding interest to the ship on the relatively small amount the ship recovered under the decision of the Court and the Settlement Agreement, as compared to the ship's claim of over $400,000.00 for loss of use.

Under the above circumstances, with equitable and discretionary considerations controlling, the ship's contentions that: (1) the District Court abused its discretion in denying costs to the ship, and/or (2) the Court gave or

had no reason to deny costs to the ship, and/or (3) Texpet did not overcome any alleged "presumption" in favor of costs being awarded to the "prevailing party", are as unrealistic and strained as the unmeritorious claim of the ship for additional alleged lost profit of $303,297.05.

Conclusion

The District Court did justice between the parties on the damage, interest and cost points raised on appeal. The District Court decided the case in accordance with existing authorities, and reached an equitable result. Judge Boldt obviously ". . . spent a tremendous amount of time on it . . .", in order to appreciate and follow the realities of the tanker chartering world and the precise dates, facts, figures and computations involved in the case. The District Court's determination that the ship's provable loss of use or lost profit was $81,681.49, was consistent with the guideline provided by this Court, and relied upon in part by the District Court, from *Sinclair Refining Co.* v. *The American Sun*, 188 F.2d 64:

> "whatever the method employed (in calculating loss), it should be one that is reasonably adapted to the circumstances of each case so that there will, on the one hand, be no failure to award damages suffered, and on the other, no unreasonable award based upon some theoretical concept of loss." (241a, 242a)

The decision of the District Court should be affirmed in all respects.

Respectfully submitted,

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